UNITED
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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 540

Case No. 572: ISAACS

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Ahmed Osman, Vice-President; Mr. Ioan Voicu;

Whereas, on 4 December 1990, Laurel Robin Isaacs, a staff member of the United Nations and former staff member of the United Nations Institute for Training and Research, hereinafter referred to as UNITAR, filed an application containing the following pleas:

"PLEAS

1. Applicant respectfully requests the Administrative Tribunal to take note of its Judgement No. 423, Isaacs (1988), wherein it decided, inter alia:

(a) That the Applicant was a staff member of UNITAR and consequently of the United Nations between 1 November 1975 and 31 March 1985 when she was first awarded a one year fixed-term appointment under the 100 Series Staff Rules;

(b) That this was in accord with the terms of the first letter of appointment awarded to the Applicant on 30 October 1975 which stipulated that 'During the tenure of this appointment you will have the status of an official of the United Nations in accordance with Article V of the UNITAR Statute'.

2. The Applicant also requests the Administrative Tribunal to affirm:

(a) That under paragraph 2 of Article V of the UNITAR Statute then in force (...), service of the UNITAR staff shall generally conform to the United Nations Staff Rules and Regulations, subject to such arrangements for special rules or terms of appointment as may be agreed by the Executive Director and the Secretary-General;

(b) That no special rules or terms of appointment had ever been agreed by the Executive Director and the Secretary-General to exclude UNITAR full time staff from the normal conditions of service defined in the Staff Regulations and the Staff Rules;

(c) That in the absence of agreed special rules or terms of appointment the Staff Regulations and Staff Rules and administrative issuances of the United Nations Secretariat ipso facto applied to the full-time staff of UNITAR, including the Applicant;

(d) That by resolution 596(VI) dated 2 February 1952 the General Assembly adopted staff regulation 6.2 which continues to govern the conditions of service of all staff. The staff regulation provides:

'The Secretary-General shall establish a scheme of social security for the staff, including provisions for health protection, sick leave and maternity leave, and reasonable compensation in the event of illness, accident or death attributable to the performance of official duties on behalf of the United Nations.'

(e) That the Applicant's letter of appointment dated 30 October 1975 (...) spelling out conditions of employment and stipulating under (c) 'you will not be entitled to any other benefits or payments' was a clear violation of both the UNITAR Statute and the United Nations Staff Regulations and Rules;

(f) That the denial to her of medical insurance from 1975-1985 under staff regulation 6.1 has deprived her of the opportunity to

accumulate ten years of contributory participation and has resulted in a recent administrative decision to exclude her from the benefit of the subsidized After-Service Insurance Scheme provided for in Administrative Instructions ST/AI/172 dated 27 March 1967 (...), ST/AI/172/Add.1 dated 18 June 1968 (...) and other amendments and addenda;

(g) That had the Applicant not been denied opportunity to participate and had she been awarded medical protection under staff regulation 6.1 and the pertinent Administrative Instruction implementing the Medical Insurance Scheme, she would have had more than ten years of coverage (the qualifying period) and been eligible for the subsidized After-Service Health Insurance Coverage;

(h) That in the particular circumstances of this case the decision to deny the Applicant participation in the subsidized After-Service Insurance Scheme was based on the denial to her, while in service with UNITAR, of the opportunity to participate in health protection in accordance with staff regulation 6.2 in clear violation of Article V of the UNITAR Statute (...) and on the erroneous assumption that she had received, effective 1 January 1980, reimbursement of half the amount of her contribution to a health insurance plan of her own choosing (...);

(i) That due to the insecurity of the Applicant during the improperly tailored contracts called Letters of Award prior to 1 January 1985, when she was awarded her first one-year appointment under the 100 Series Staff Rules, she was not in a position to challenge the Administration of UNITAR for violating United Nations Staff Rules and Regulations;

(j) That the Applicant be declared entitled to United Nations subsidized After-Service Health Insurance with full effect from the date of her retirement, 31 March 1991, and that the condition of ten years of previous participation in the insurance plan be declared not applicable in her case,

especially as it would not involve the United Nations in any retroactive financial obligation whatsoever;

(k) That she be awarded adequate compensation in the event the Secretary-General refuses to authorize her participation in the subsidized After-Service Health Insurance scheme effective the date of her retirement, 31 March 1991."

Whereas the Respondent filed his answer on 13 May 1991;

Whereas the Applicant filed written observations on 3 June 1991;

Whereas the Respondent provided additional information on 21 October 1991 at the request of the Tribunal;

Whereas the facts in the case subsequent to those stated in Judgement No. 423 are as follows:

In a memorandum of 26 April 1990 addressed to the Chief of the Insurance Section, the Applicant, whose participation in the United Nations health insurance scheme had begun in 1985 and who was due to retire on 31 March 1991, requested a waiver of the ten-year requirement of contributory participation in the scheme for purposes of receiving, upon her retirement, the organizational subsidy in respect of her participation in the after-service health insurance scheme (ASHI). In her memorandum, she enclosed a copy of Judgement No. 423 and stated:

"As you will see, the Administrative Tribunal determined that I had been wrongfully excluded from participation in the United Nations Joint Staff Pension Fund [UNJSPF] as a result of an 'adminis-trative error,' whose effect denied me, inter alia, pension coverage and opportunity to join the medical plan for the first ten years of my United Nations employment. The Administrative Tribunal ordered its Judgement implemented immediately, thereby making my participation in the UNJSPF retroactive to November 1975.

Although I had attempted to enrol in the United Nations subsidized medical plan in 1976 I was denied that opportunity as a result of the same 'administrative error' and for the same ten-year period by virtue of the fact that I was not in possession of a 100 Series contract. I was told categorically that until my contractual status

was regularized I would not be eligible for UN subsidy. Under those conditions I decided to continue my individual Blue Cross policy because, in spite of the fact that what I carried was considerably less comprehensive than the UN plan, it was less expensive. This was a risk I was compelled to take because I simply could not afford to pay the UN plan premium without subsidy.

My employment contract with UNITAR was converted in 1985 from the now discredited 'Letter of Award' to a Fixed Term 100 Series, allowing me access finally to all benefits. I joined the United Nations Blue Cross/Aetna programme as soon after conversion of my contract as possible but because of the euphemistically termed 'administrative error' I will not have had the requisite ten years of UN medical coverage, when I reach mandatory retirement age in 1991, to qualify for after-service immediate UN subsidy. I now face the onerous prospect, after having been a United Nations staff member for fifteen-plus years, of having to pay the full insurance premium for almost five years after retirement before the UN again contributes its subsidy.

What is at stake here is the question of not having been granted the same opportunity given other staff members. The illegality of my original contract has caused me considerable hardship in terms of lack of job advancement and therefor lost revenue. I should not have to suffer additional deprivation in the form of increased insurance premiums at the time of greatly reduced income.

In view of the circumstances it is only fair that the five-year rule with regard to insurance premiums be waived, consistent with and in recognition of the Administrative Tribunal Judgement rendered in my favour."

In a reply dated 11 June 1990, the Chief of the Insurance Section informed the Applicant that, following consultations with the Office of Legal Affairs, her request could not be granted, the principal reason for denying it being that

"under the terms of your Letter of Award employment contracts (LOAs) with UNITAR, you were not entitled to participate in the Organization's health insurance programme. The LOAs were contracts which were voluntarily signed by you and you are bound by their provisions unless contrary to Assembly Regulations (as was the case for your exclusion from the Pension Fund, where the Pension Regulations stated that exclusion from the Fund had to be specifically provided for in writing)."

On 21 June 1990 the Applicant requested the Secretary-General to review the administrative decision communicated to her by the Chief of the Insurance Section. On 6 September 1990 the Director of the Staff Administration and Training Division replied on behalf of the Secretary-General that he could see no grounds on which to reverse the decision; he stated inter alia:

> "Unlike Pension Fund participation, medical insurance participation is voluntary. There is no equivalent, in the various health insurance schemes in which the Organization participates, of article 21(a) of the Regulations and Rules of the UNJSPF under which coverage for staff members of member organizations is automatic unless specifically excluded by their terms of appointment. The Letters of Award which you signed and accepted between 1 November 1975 and 31 March 1984 stipulated that except for the conditions specified therein (e.g. monthly salary, annual and sick leave, compensation in the event of death, injury or illness attributable to employment,) you would not be entitled to any other benefits or payments. That you understood this exclusion to include participation in the Organization's subsidized health insurance programme is indicated by the fact of your having been granted, effective 1 January 1980, reimbursement of half the amount of your contribution to a health insurance plan of your own choosing. You accepted these conditions, under successive contracts, until you were granted a regular fixed-term appointment under the 100 Series on 1 January 1985, at which time you became eligible for, and joined, one of the health insurance schemes offered by the Organization."

On 12 September 1990 the Secretary-General agreed to direct submission of the Applicant's case to the Tribunal and on 4 December 1990 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. UNITAR's violation of article V.2 of its Statute and United Nations staff regulation 6.2 has led to the situation which the Respondent is now using to bar the Applicant's participation in subsidized ASHI. The Respondent is estopped from using an illegal act or omission to escape an otherwise legitimate claim by the Applicant.

2. The Letters of Award, declared "legally imperfect" by the Executive Director of UNITAR, stipulated that the Applicant, who held the status of an international civil servant, was subject to all the obligations of the Staff Regulations, and yet denied her the medical insurance coverage provided in staff regulation 6.2. Such an untenable situation cannot be justified under the letter and spirit of the Organization's Staff Regulations and Rules.

3. There was no free and voluntary choice on the part of the Applicant while serving on the basis of Letters of Award tailored in such a manner and for such brief periods as to maintain the staff on a short leash, with no sense of security or freedom to challenge any term of appointment.

Whereas the Respondent's principal contentions are:

1. The Applicant's claim is time-barred under staff rule 103.15.

2. The terms and conditions of the UNITAR Letter of Award did not entitle the Applicant to participate in any of the United Nations group health plans. The "omnibus clause" stipulating that the holder "will not be entitled to any other benefits or payments" was ineffective to preclude participation in the Pension Fund because of the clear terms of article 21 of the Pension Fund Regulations which mandates that exclusion from the Fund be expressly stated in the contract of employment, but it was otherwise effective. The question of health benefits was a matter negotiated between the parties and freely accepted by the Applicant with full knowledge of the limited resources available to UNITAR. As to staff regulation 6.2, it does not require that every staff member participate in, or be given the opportunity to participate in, a group plan. It merely required the Respondent to establish a scheme to protect the health of the staff, eligibility to participate being based on the employment contract.

The Tribunal, having deliberated from 15 October to 5 November 1991, now pronounces the following judgement:

I. The Applicant entered the service of the United Nations Institute for Training and Research (UNITAR) in 1975. She contests the Respondent's decision to exclude her from the benefit of the after-service health

insurance scheme subsidized by the United Nations. The reason for this decision is that, on the date of her retirement, 31 March 1991, the Applicant did not have 10 years of participation in the United Nations health insurance programme, the qualifying period for receiving the benefit of the subsidized after-service health insurance scheme.

II. The Applicant states that from 1975 to 1985, or for nearly 10 years, she was unable to participate in the health insurance programme offered to the United Nations staff. She alleges that the responsibility for this state of affairs rests with the Administration which, during this period, wrongfully denied her that option.

III. The Respondent has not denied that, in 1976, the Applicant attempted to enrol in the United Nations health insurance programme. However, in his letter of 6 September 1990 to the Applicant, the Director of the Staff Administration and Training Division replied that the Letters of Award which she had signed and accepted between 1 November 1975 and 31 March 1984 had excluded her from participation in the Organization's health insurance programme. He maintained that this had been well understood by the Applicant and that, furthermore, she had been granted, effective 1 January 1980, reimbursement of half the amount of her contribution to a health insurance plan of her own choosing.

IV. The Applicant states that, in fact, she has never been reimbursed for half the amount of her contributions as provided for in the letter of 14 July 1980 from the Chief of UNITAR Finance and Administration. This assertion was confirmed on 12 November 1990 by the Chief Administrative Officer of UNITAR. The Applicant explains that she declined reimbursement so as not to forfeit her right to the health insurance coverage granted by the United Nations to staff members.

V. After reviewing all the circumstances of the case, the Tribunal finds that the Administration, during the period 1975-1985, never proposed to grant to the Applicant the benefit of the health insurance programme applied to the staff.

VI. The Tribunal must therefore determine whether, during the period 1975-1985, the UNITAR Administration erred in denying or in not offering to the Applicant the benefit of the United Nations health insurance programme and thus entailed the Organization's responsibility.

VII. The Applicant maintains that Judgement No. 423 (1988), rendered by the Tribunal in her favour, establishes in law the validity of her current claim.

VIII. Judgement No. 423 decides that UNITAR is part of the United Nations and that its staff members are staff members of the Organization. It further decides that the Applicant was employed, for a certain period, as a consultant under a special service agreement and later as a staff member. The Tribunal found that this later period ran from 1 November 1975.

IX. The Tribunal further decided in its Judgement No. 423 that, contrary to the view then held by the Administration, the Applicant had been deprived of her right to participate in the Joint Staff Pension Fund through an "administrative error". The Tribunal did not consider that the Applicant's participation in the Pension Fund had been excluded by the clause in the Letter of Award providing that "you will not be entitled to any other benefits or payments" than those specifically listed (Judgement No. 423, end of para. IV).

X. The Tribunal also decided that, contrary to the view held by the Administration in that first case, the Applicant had not consented to her exclusion from participation in the Pension Fund. The Tribunal noted the "requirement for clarity, or in other words, for an 'express' provision of exclusion in order to make it effective". The Tribunal thus indicated that the waiver of a benefit cannot be presumed.

XI. Contrary to the Respondent's contention, therefore, the Tribunal considers that Judgement No. 423 is not based solely on article 21 (a) of the Regulations of the United Nations Joint Staff Pension Fund. The reasons set forth and summarized above have a general character and are applicable to the present case.

XII. The Tribunal finds that the Applicant's Letters of Award did not expressly exclude her participation in the United Nations health insurance programme. The Tribunal considers that the establishment of a health insurance programme is a basic element of the status of United Nations staff members. Such a programme promotes both the morale and the physical well-being of staff members. The exclusion of a staff member from participation in the health insurance programme - assuming that it is valid - cannot be merely implied.

XIII. The Tribunal also considers that, during the period 1975-1985, the Applicant did not consent to such exclusion. It notes, in this connection, that when the Applicant was regarded as eligible to participate in the health insurance programme, she joined it on 1 June 1985.

XIV. Under these circumstances, the denial to the Applicant, from 1975 to 1985, of the option of participating in the health insurance programme constituted an error which entails the Administration's responsibility.

XV. The Applicant is not retroactively claiming the benefit of the United Nations health insurance programme. She would be barred from doing so anyway. She is merely requesting reparation of a consequence of the error committed by the Administration. Upon her retirement, she was unable to document 10 years of participation in the United Nations health insurance programme, although she had had the status of a staff member of the Organization for more than 15 years.

XVI. The Tribunal considers that, as reparation, the decision of 6 September 1990 should be rescinded and the Applicant granted the benefit of the subsidized after-service health insurance scheme.

XVII. The Tribunal rejects the time-bar argument invoked, without justification, against the Applicant's claim. The Applicant requested coverage under the subsidized after-service health insurance scheme on 1 March 1991. She had submitted her claim to the Administration on 26 April 1990. The subsidy due to her ran only from the date of her retirement. The

Applicant therefore acted within the one-year time-limit provided for in staff rule 103.15, assuming that that provision is applicable in this instance.

XVIII. For the foregoing reasons, the Tribunal:

1. Rescinds the Respondent's decision of 6 September 1990 and orders the Respondent to grant to the Applicant the benefit of the subsidized after-service health insurance scheme, effective 1 April 1991.

2. If, within 30 days of the notification of the judgement, the Secretary-General should decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in her case, the Tribunal fixes the amount of such compensation at the sum which the Organization would have paid to subsidize the health insurance scheme, effective 1 April 1991 and continuing until the date on which the Applicant benefits from the United Nations subsidy under this scheme.

3. Rejects all other pleas of the Applicant.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Ioan VOICU
Member

New York, 5 November 1991

Jean HARDY
Acting Executive Secretary